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NO. 1519

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

HENRY GRADY WHITEHEAD, SR.
and ARMEL DAYTON O'NEAL, *Petitioners*

VERSUS

UNITED STATES OF AMERICA

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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NO. _____

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OCTOBER TERM, 1970

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and ARMEL DAYTON O'NEAL, *Petitioners*

versus

UNITED STATES OF AMERICA

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

TO THE HONORABLE SUPREME COURT:

Petitioners, Henry G. Whitehead, Sr. and Armel Dayton O'Neal, pray for Writ of Certiorari to review the decision of the Court of Appeals for the Fifth Circuit in Cause No. 29,498, United States of America v. Henry G. Whitehead, Sr., Armel Dayton O'Neal and Lamarr C. Bailey, in such Court.

OPINION OF COURT OF APPEALS

The Court of Appeals affirmed the judgment of the trial court without written opinion under Local Rule 41. The copies of the order of the Court affirming the judgment of the trial court and overruling and denying the petition for rehearing appear in the appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on the 4th day of February, 1971. A motion for rehearing was timely filed and this motion was denied on the 1st day of March, 1971. The jurisdiction of this Court is invoked under the provisions of 28 *U.S.C. Section 1254(1).*

QUESTIONS PRESENTED

Insofar as the petitioner, Henry Grady Whitehead, Sr., is concerned, the issue is whether the evidence is sufficient to connect him with the purchases of merchandise made by other defendants.

Insofar as Armel Dayton O'Neal is concerned, the issue is whether the trial court was in error in overruling his objections to evidence.

STATEMENT OF THE CASE

This is an appeal from a conviction of the petitioners on nine counts of an indictment charging fraudulent use of the United States Mail and of interstate telephonic communications and conspiracy.

The petitioner, Armel Dayton O'Neal, was sentenced to serve five years on counts one, two, three, four and nine in the indictment and was sentenced to an additional five years on counts five, six, seven and eight, such additional sentence being probated.

The defendant, Henry Grady Whitehead, Sr., was sentenced to imprisonment for a period of five years on all counts.

The indictment in its first count charged that Henry Grady Whitehead, Sr., Armel Dayton O'Neal and Lamarr Carlyse Bailey, together with a co-schemer, not named as a defendant, devised a scheme to defraud persons, corporations, businesses and firms in various parts of the United States by inducing them to sell goods, wares and merchandise to the petitioners. A part of the scheme alleged was the creation of a corporation under the name of "XIT Corporation" and making false representations as to the assets of the corporation. It was alleged that Henry Grady Whitehead, Sr. would usually make sales of the merchandise for the petitioners and often used the facilities of a store operated by him in Fort Worth, Texas for this purpose.

It was alleged that the petitioners sent by United States mail a promissory note to Universal Supply Company in Kansas City, Kansas; that petitioners transmitted and caused to be transmitted telephonic wire communications from Fort Worth, Texas to the offices of Universal Supply Company, Inc. in Kansas City, Kansas; that the petitioners caused William Hooker of Dallas, Texas to have long-distance telephone conversations with representatives of Huffman Manufacturing Company of Dayton, Ohio; that petitioners caused to be mailed to Huffman Manufacturing Company, Dayton, Ohio, a purchase order for merchandise; that petitioners caused to be mailed by United States mail a purchase order to Sony, Long Island City, New York; that petitioners caused to be mailed to Merit Enterprise, Brooklyn, New York, a

purchase order for merchandise; that petitioners caused to be mailed to Durham Corporation of Cincinnati, Ohio, a purchase order and purported financial statement of XIT Corporation; and that petitioners did conspire to commit certain offenses and to willfully violate Sections 1341 and 1343, Title 18, United States Code.

It is not shown by any evidence in the record that the petitioner Whitehead personally participated in sending any character of message or communication to any point outside of the State of Texas in connection with the purchase of the various items of goods, wares and merchandise. All of this was shown to be done in his absence. Insofar as the first eight counts in the indictment are concerned, he could be convicted only if the evidence is sufficient to prove a conspiracy to do the acts charged. On the ninth count which charges conspiracy as a separate crime, of course the conspiracy must necessarily have been proved.

There is no direct evidence that he entered into a conspiracy with the other petitioner, and the only evidence presented is circumstantial evidence.

These circumstances, briefly, are that Whitehead in some manner loaned $3,000.00 to A. D. O'Neal; that A. D. O'Neal and the witness Applewhite deposited this money and it is traced to the account of XIT Corporation.

That H. G. Whitehead purchased certain items of equipment from XIT Corporation, giving his note therefor, which note had not been paid, and that he

sold these items to other individuals or firms for cash.

The objection to the evidence is presented on behalf of Armel Dayton O'Neal.

At the time the judgments were offered in evidence, that is, the judgments against Whitehead, during the testimony of Stanley W. Winford, Mr. Moore on behalf of O'Neal objected because O'Neal was not a party to the judgments and they were hearsay and not binding on him and were dated in 1963 or 1964 and too remote to be used; that they were not admissible to show pattern or system and not related to the indictment that the defendants are on trial for, and constitute an attack on the petitioner O'Neal when he has not taken the witness stand, and not in rebuttal of any evidence offered by O'Neal. This objection was overruled.

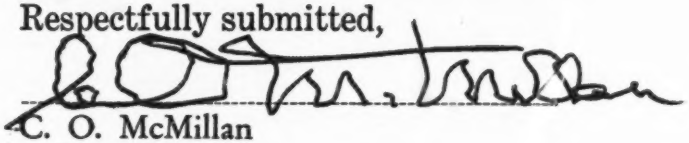
ARGUMENT

In the case against Whitehead, his knowledge of the transmissions of messages, either by letter or by wire communication in interstate commerce, is not proved either by the fact that he procured a loan of money to O'Neal, if he did, nor by the fact that he purchased goods from XIT Corporation which he did not pay for. The act of lending money is entirely consistent with the theory that he was merely making a loan. The act of purchasing goods and giving his note therefor and reselling the goods and not paying the note is as consistent with his dealing with O'Neal and Bailey as strangers as it is with his having become their partner or co-conspirator.

Insofar as O'Neal is concerned, the objection to the judgments against Whitehead which were introduced in evidence should have been sustained for the reason that O'Neal was not a party to these judgments; they were taken several years before the transactions for which he was on trial occurred, and were not in rebuttal to any evidence offered by O'Neal.

WHEREFORE, petitioners pray that Writ of Certiorari be granted and that upon final hearing, the judgments of the trial court and the Court of Appeals be reversed.

Respectfully submitted,



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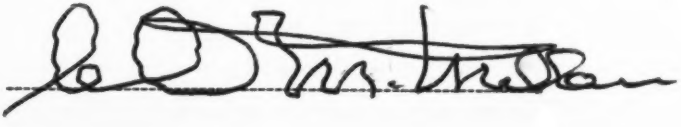
Three copies of the foregoing petition have been deposited in the United States Post Office at Fort Worth, Texas, with first class postage prepaid, addressed to the Solicitor General, Department of Justice, Washington, D. C. 20530. The 24 day of March, 1971.



APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1970

No. 29498

D. C. Docket No. 4-597-CR

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

HENRY GRADY WHITEHEAD, SR., ARMEL DAYTON O'NEAL and LAMARR C. BAILEY,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Texas

Before JONES, BELL and SIMPSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel for appellants Whitehead and O'Neal; and was taken under submission by the Court upon the

record and briefs on file for appellant Bailey;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

February 4, 1971

Issued As Mandate: March 18, 1971
(As to Bailey only)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29498

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

HENRY GRADY WHITEHEAD, SR., ARMEL DAYTON O'NEAL and LAMARR C. BAILEY,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Texas

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(March 1, 1971)

ON PETITION FOR REHEARING

Before JONES, BELL and SIMPSON, Circuit Judges.
PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.